United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-2008

To be argued by: Jay M. Cohen

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NUMBER 76-2008

ERNEST WALTERS,

Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee

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P/S

On Appeal from the United States District Court for the Southern District of New York, Denying Petitioner's Motion to Vacate Sentence

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REPLY BRIEF FOR PETITIONER-APPELLANT

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REPLY BRIEF FOR PETITIONER-APPELLANT

Petitioner-appellant appeals from a judgment of the United States District Court for the Southern District of New York (Lasker, J.) 404 F. Supp. 996 (S.D.N.Y. 1975), denying his Motion to Vacate Sentence, filed pursuant to 28 U.S.C. §2255. Petitioner contends that the District Court's failure to delay the selection of the jury in his case for a reasonable period of time to allow his retained counsel to appear constituted a denial of his constitutional right to counsel of his choice at jury selection.

ARGUMENT

I. PETITIONER'S §2255 CLAIM OF A DEPRIVATION OF HIS CONSTITUTIONAL RIGHT TO COUNSEL OF HIS CHOICE SHOULD BE HEARD, DESPITE HIS FAILURE TO APPEAL, BECAUSE IT IS AN ISSUE OF CONSTITUTIONAL DIMENSION.

For the first time in this case, the government has raised the issue of "bypass", contending that this Court can affirm the order of the District Court without reaching the merits of petitioner's claim because petitioner has "deliberately by-passed available appellate procedures following his conviction with respect to those claims." (Brief at 6)

It has been settled, at least since the United States Supreme Court's decision in Kaufman v. United States, 394 U.S. 219 (1969), that collateral review under Section 2255 is available to petitioners claiming deprivation of constitutional rights, despite the fact that such claims were not raised in direct appeal of conviction. Echoing its opinion in Sanders v. United States, 373 U.S. 1 (1963), the Kaufman court held that "'[c]onventional notions of finality of litigation have no place when life or liberty is at stake and infringement of constitutional rights is alleged.'" 394 U.S. at 228. The Court adopted the standard of Townsend v. Sain, 372 U.S. 293, 311-312 (1963), which earlier had determined that habeas corpus relief could not be denied to federal prisoners alleging constitutional deprivations solely on the ground that relief should have been sought by appeal. Kaufman v. United States, supra at 223.

This Court recognized well before Kaufman that issues of constitutional importance could be raised in a Section 2255 proceeding, despite the failure of the defendant to appeal. As Judge Friendly indicated for the Court in United States v. Sobell, 314 F.2d 314, 323 (2d Cir. 1963), Section 2255 relief is available to a defendant who did not appeal if he can show "a significant denial of a constitutional right, even though he could have raised the point on appeal and there was no significant reason for not doing so." Petitioner's claim of a deprivation of his right to counsel, guaranteed him by the Sixth Amendment to the United States Constitution, is clearly such a proper claim under Section 2255. Johnson v. United States, 506 F.2d 640 (8th Cir. 1974), cert. denied, 420 U.S. 978 (1975). See also Reed v. United States, 354 F.2d 227, 229 (5th Cir. 1968)("... it is settled that this right [to counsel] may be collaterally claimed in a Section 2255 proceeding"); Hunt v. United States, 456 F.2d 582, 583 (3d Cir. 1972)(Sixth Amendment speedy trial claim must be adjudicated in a Section 2255 proceeding if not previously raised).

This case falls within the standard of Kapatos v. United States, 432 F.2d 110, 113 (2d Cir. 1970), because it raises a constitutional issue that has not already been adjudicated. See United States v. Ballantine, 410 F.2d 375, 377 (2d Cir. 1969), cert. denied, 397 U.S. 928 (1970); Houser v. United States, 508 F.2d 509, 517 (8th Cir. 1974); Duhart v. United States, 476 F.2d 597 (6th Cir. 1973); Brown v. United States, 468 F. 2d 897 (5th Cir. 1972). As a matter of fact, the government conceded this point before the district court in this case, concluding that:

> Walter's failure to perfect a direct appeal in which he could have raised the issue of the alleged denial of the effective assistance of counsel is apparently no bar to his raising that issue in this collateral attack on his conviction. See Kaufman v. United States, 394 U.S. 217 (1969); Howell v. United States, 442 F.2d 265, 272 (7th Cir. 1971). (Government brief below at 3, footnote 1)

The government now argues that because petitioner "deliberately by-passed" normal appellate procedures, the Kaufman rule does not apply. It is significant that in the decisions of this Court that the government cites for this proposition, the Court determined that the failure to raise the constitutional issues on direct appeal was the result of a deliberate, tactical choice by petitioner and counsel. Such a determination cannot be made in this case. Petitioner at trial was represented by the same attorney whose conduct resulted in the denial of representation of which he now complains. To foreclose appellate review of the decision of the district court because this counsel did not object to that decision during or after trial would, in effect, punish petitioner twice for the failure of his counsel to appear at jury selection.

Likewise, petitioner's failure to raise this issue on direct appeal does not preclude Section 2255 review. While the government contends that "a clearer case of deliberate by-pass would be hard to imagine," (Brief at 7), no facts are presented to distinguish this case from the ordinary situation in which Kaufman would allow collateral review. To deny Section 2255 review in this case would be to conclude that under almost

no circumstances is such review available when no direct appeal has been taken, a conclusion that Kaufman explicitly rejects. Kaufman v. United States, supra at 220, footnote 3.

The claim of the government is essentially that petitioner has waived his right to appellate consideration of his claim. Before the issue of "deliberate by-pass" can be raised, the government must show that "appellant's right to appeal was voluntarily and understandingly waived." McKnight v. United States, 507 F.2d 1034, 1036 (5th Cir. 1975). See Fay v. Noia, 372 U.S. 391 (1962). In discussing whether a petitioner had waived his right to review by failing to appeal, the Supreme Court has said that "such a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." Humphrey v. Cady, 405 U.S. 504, 517 (1972). The required showing has not been made in this case, and there is no indication that petitioner deliberately did something that would foreclose all review of his conviction. A decision that petitioner in this case is forever barred from raising an issue which has not previously been brought before the Court would deny him his right to collateral and appellate review of errors of constitutional dimensions under Section 2255. Kaufman, supra; Kapatos, supra.

II. PETITIONER-APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL OF HIS CHOICE BY VIRTUE OF THE TRIAL COURT'S FAILURE TO GRANT A REASONABLE CONTINUANCE TO ALLOW HIS RETAINED COUNSEL TO APPEAR.

The government does not deny that petitioner's constitutional right to counsel of choice, guaranteed him by the Sixth Amendment to the United States Constitution, extends to the selection of a jury. Rather, the government contends that (a) the Court did not abuse its discretion in refusing to delay the start of petitioner's trial for one day, and (b) because petitioner cannot demonstrate that he suffered prejudice, his Sixth Amendment right to counsel was not violated.

The trial court in petitioner's case refused to adjourn the proceedings temporarily, despite petitioner's expressed desire to wait for his retained counsel to appear, without determining that any resulting delay would be unreasonable and unfairly impede the due administration of justice. This in itself amounted to a denial of petitioner's right to be represented at jury selection by counsel of his choice. United States ex rel. Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968). Had the trial judge delayed the start of jury selection until the following day, he would have been able to determine that no further continuance was necessary. It is true that at the time he acted, Judge Lasker did not know that the delay would be so short. However, when measured against the standards of the decisions cited by both sides in this case, the trial court's refusal to delay the proceedings at least overnight under these circumstances amounted to an abuse of discretion.

The government concedes that while the decision to grant or deny a continuance is a matter within the sound discretion of the trial judge, a defendant must be given a fair and reasonable opportunity to be represented by counsel of his choosing. Though this is a question that will turn upon the facts of each case, decisions of the federal courts in this area can provide a guide as to the reasonableness of the trial judge's actions in this case. Petitioner was only given a few hours to be represented by his own attorney. In all of the cases cited by the government on this issue, defendants were given considerably more opportunity to be represented by their retained attorney. In United States ex rel. Carey v. Rundle, 409 F.2d 1210 (3d Cir.), cert. denied, 397 U.S. 946 (1970), the trial was first delayed thirty days from the day it was to begin, even though the government was ready to proceed with its witnesses. At the new trial date the court gave the defendant two additional days to retain counsel when thirty proved not enough. When defendant failed once again to get his own attorney, the court was prepared to delay the start of the trial a third time until it became clear that the defendant would never be able to get his own lawyer. Only then did the court's weighing of the competing interests (Government's Brief at 12) require that the defendant be represented by appointed counsel. In United States v. Tortora, 464 F.2d 1202 (2d Cir.) cert denied 409 U.S. 1063 (1972), the defendant knew on April 15, 1971 that his attorney might be unable to appear at the start of trial on August 10, 1971.

Despite this, the Court still delayed the start of trial six days when retained counsel was absent on August 10. See also Ungar v. Sarafite, 376 U.S. 575 (1964)(five day delay was long enough); United States v. Bentevena, 319 F.2d 916 (2d Cir.), cert. denied sub nom. Ornento v. United States, 375 U.S. 941 (1963)(delay of two weeks granted); Lofton v. Procunier, 487 F.2d 434 (9th Cir. 1973)(four week delay provided defendant fair and reasonable opportunity to retain counsel).

When viewed in the light of these cases, the trial court's refusal to delay more than a few hours in petitioner's case was clearly unreasonable. Judge Lasker was properly concerned with having the members of the jury pool wait all day (Tr. at 12,13,16,20). Avoiding minor delays for jurors, witnesses, and other defendants is not a sufficient reason to override a defendant's constitutional right to counsel of choice. United States ex rel Carey v. Rundle, supra; United States v. Tortora, supra; United States v. Johnson, 318 F.2d 288, 291 (6th Cir. 1963). While the government and the court below discuss the need to avoid delay to witnesses and other defendants, only the interests of the jurors were involved in the refusal to delay jury selection in petitioner's case. After jury selection the trial ultimatively was continued overnight, despite the presence of witnesses, attorneys, and co-defendants, so that petitioner could be represented by counsel of his choice.

Unlike United States v. Tortora, supra and United States v. Bentevena, supra where a series of delays by attorneys and defendants indicated an intention deliberately to delay the proceedings, no such suggestion can

be made here. Petitioner himself was not even responsible for the delay. His only desire was to be represented at trial by the attorney he had retained and with whom he had prepared for trial. Because any resulting delay was not attributable to petitioner, the trial court's refusal to delay the trial longer than he did was unreasonable. United States ex rel Davis v. McMann, supra; Lee v. United States, 235 F.2d 219, 221 (D.C. Cir. 1956). While the court has a duty to weigh the competing interests involved and to consider the due administration of justice, the trial court's refusal to continue petitioner's case for a reasonable period of time amounted to an abuse of discretion.

Where there has been "a complete disregard of the defendant's right to choose his own counsel," prejudice to him will be assumed. Releford v. United States, 288 F.2d 298, 302 (9th Cir. 1961). The government attempts to distinguish this case and United States v. Johnson, 318 F.2d 288, 291 (6th Cir. 1963) on the ground that there counsel was appointed for the entire trial. Yet, the courts in both cases explicitly determined that no actual prejudice occurred. In the cases cited by the government where prejudice was discussed, the defendants had already been given numerous opportunities to be represented by counsel of their choice. United States v. Dardi, 330 F.2d 316, 335 (2d Cir. 1964); United States v. Tortora, supra; Lofton v. Procunier, supra. The only two cases similar to petitioner's that were cited by the government are Urban v. United States, 46 F.2d 291 (10th Cir. 1931) and Smith v. United States, 288 F.2d 259

(D.C. Cir. 1923). In neither of these cases did the defendants object at the time. In addition, the holding in Smith was rejected by the Court of Appeals in Lee v. United States, supra.

Conclusion

Petitioner was entitled to counsel of his choice at jury selection, an admittedly significant stage of the proceedings. While the role of counsel at this stage of a federal trial is somewhat limited, peremptory challenges provide the defendant with his only means of direct participation in jury selection. Petitioner was entitled to be represented by the counsel he had retained - an attorney totally familiar with his case and committed only to representing him. When that counsel failed to appear, on the day of trial, through no fault of petitioner's, petitioner had to be given a reasonable opportunity to be represented by the counsel of his choice at this important point in the proceedings against him. The trial court's failure to give him that opportunity denied him his constitutional right to counsel of choice.

Petitioner respectfully prays that the decision of the court below be reversed, and that his conviction be vacated.

Respectfully submitted,

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PETITIONER-APPELLANT'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Brief of Petitioner-Appellant in the above-captioned appeal was hand delivered to the United States Attorney, Southern District of New York, Foley Square, New York, New York, on April 15, 1976.